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Marcus A. Manos
Member
Admitted in SC, NC, DC

August 19, 2005

BY HAND DELIVERY

Charles L.A. Terreni
Chief Clerk & Administrator
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, South Carolina 29210

8/22/05
too
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AUG 23 2005

PGC SC
DOCKETING DEPT.

**Re: South Carolina Electric & Gas Company vs. Aiken Electric
Cooperative, Inc. / Docket No. 2005-180-E and 2003-254-E**

Dear Mr. Terreni:

Enclosed herewith for filing with your office is the original and eleven copies of the **Respondent Aiken Electric Cooperative, Inc.'s Memorandum in Support of Its Motion to Vacate, Modify, and/or Reconsider the Commissioner's Order to Consolidate** in the above referenced matter. Please return a copy, clocked-in, with the courier.

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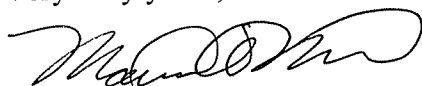
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By copy of this letter and as evidenced by the attached Certificate of Service, we are serving counsel of record, the hearing officer, and the Office of Regulatory Staff with five copies of the above-referenced document.

Very truly yours,



Marcus A. Manos

MAM/vlm

Enclosures

cc: Robert E. Tyson, Jr. Esquire
Patricia Banks Morrison, Esquire
Jeffrey M. Nelson, Esquire
Shannon Bowyer Hudson, Esquire
Wendy B. Cartledge, Esquire

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BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2005-180-E

IN RE:

South Carolina Electric & Gas Company,

Complainant,

vs.

Aiken Electric Cooperative, Inc.,

Respondent.

**RESPONDENT AIKEN ELECTRIC
COOPERATIVE, INC.'S
MEMORANDUM IN SUPPORT OF ITS
MOTION TO VACATE, MODIFY,
AND/OR RECONSIDER THE
COMMISSIONER'S ORDER TO
CONSOLIDATE**

Pursuant to Regulations 103-880(D) and 103-881, Respondent Aiken Electric Cooperative, Inc. ("Aiken") submits this Memorandum in Support of its Motion to Vacate, Modify, and/or Reconsider the Commissioner's Order to Consolidate.

On June 17, 2005, Aiken received SCE&G's Complaint and Motion to Consolidate cases 2005-180-E and 2003-254-E. Under Regulation 103-841, Aiken's receipt of the Complaint and Motion triggered a 30-day period in which to respond. On June 30, 2005, however, just 13 days after Aiken's receipt of the Complaint and Notice, the Commission granted SCE&G's motion without affording Aiken an opportunity to be heard and oppose the Motion. On July 7, 2005, the Commission entered a formal Order consolidating the cases.

Had the Commission given Aiken an opportunity to respond, Aiken would have opposed the motion. Cases 2005-180-E and 2003-254-E should not be consolidated because they concern the application of distinct laws to distinct sets of facts. Consolidation will waste time, cause confusion, and materially prejudice Aiken. By failing to allow Aiken an opportunity to oppose

this motion, the Commission deprived Aiken of a right to a fair proceeding and denied it due process. For the reasons discussed below, the Commission should vacate its rulings dated June 30, 2005 and July 7, 2005 and deny the Motion to Consolidate.

ARGUMENT

I. BY FAILING TO GIVE AIKEN AN OPPORTUNITY TO OPPOSE SCE&G'S MOTION TO CONSOLIDATE, THE COMMISSION DENIED AIKEN DUE PROCESS OF LAW.

The Commission's advance ruling on SCE&G's motion denied Aiken the opportunity to be heard. The due process clause of the Fourteenth Amendment requires notice and the opportunity to be heard. U.S. CONST. amend XIV; South Carolina Dept. of Social Services v. Wilson, 352 S.C. 445, 452, 574 S.E.2d 730, 734 (2002); Cameron & Barkley Co. v. South Carolina Procurement Panel, 317 S.C. 437, 440, 454 S.E.2d 892, 894 (1995). The South Carolina Constitution demands that agencies give parties due notice and an opportunity to be heard. S.C. CONST. Art. I, § 22. A party is denied due process of law when a lack of notice and opportunity to be heard prejudices it.

In this case, Aiken received SCE&G's Complaint and Motion to Consolidate on June 17, 2005. Pursuant to Regulation 103-841, Aiken had 30 days in which to respond. The Commission, however, ruled on June 30, 2005, just 13 days after Aiken received the Complaint and Notice. By ruling before Aiken had an opportunity to respond, the Commission denied Aiken a meaningful opportunity to be heard.

Furthermore, SCE&G has the burden of persuading the tribunal that consolidation is appropriate. See Keels v. Pierce, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993). By denying Aiken the opportunity to oppose SCE&G's motion, the Commission improperly allowed SCE&G to meet its burden without addressing any of the issues militating against consolidation.

II. CONSOLIDATION IS IMPROPER UNDER SOUTH CAROLINA RULE OF CIVIL PROCEDURE 42, BECAUSE CASES 2005-180-E AND 2003-254-E CONCERN APPLICATIONS OF DISTINCT LAWS TO DISTINCT FACTS.

Under South Carolina Rule of Civil Procedure 42(a),¹ consolidation is improper if the cases concern distinct laws and facts. Rule 42 requires common questions of law or fact. S.C. R. Civ. P. 42(a); Keels v. Pierce, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993). In that case, the trial court denied consolidating two actions involving the same parties. One action concerned a foreclosure of a real estate mortgage and a security interest in related personal property; the second action concerned the alleged fraudulent sale of the mortgaged real estate. On appeal, the court affirmed the lower court's decision to deny consolidation. Id. at 343, 433 S.E.2d at 904.

In this case, the Commission erred by consolidating cases 2005-180-E and 2003-254-E. The later filed action, Case 2005-180-E, concerns Section 58-27-620(1)² of the Territorial Assignment Act and its application to a statutory service issue in Monetta, South Carolina.

Aiken's right to serve the premises at issue arises from the corridors rights created by the Territorial Assignment Act. The grant to serve cannot be restricted by regulations. The first filed action, Case 2003-254-E, on the other hand, concerns Regulation 103-304 and its application to a separate service issue in Swansea, South Carolina involving easements and property rights.

Aiken claims service in Case 2003-254-E based upon its property rights. A completely different legal basis exists for the service as compared to 2005-180-E. There are no common

¹ **Rule 42. Consolidation; Separate Trials**

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the action; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

² SCE&G characterized case 2005-180-E as one involving Regulation 103-304. That case, however, properly concerns Section 58-27-620(1) of the Territorial Assignment Act, because it involves Aiken's right to service assigned by statute.

fact witnesses regarding the properties involved in each case. There is no unified theme justifying a streamlined case. Instead, a consolidated case here would actually work against the aims of consolidation—that is, it would hinder efficiency rather than promote it. The cases would bog down as each side tried to disentangle one set of facts and law from the other set. See Molever v. Levenson, 539 F.2d 996 (4th Cir. 1976) (finding consolidation of three cases embracing four separate causes of action prejudiced the parties and demanded reversal); Malcolm v. National Gypsum Co., 995 F.2d 345 (2d Cir. 1993) (reversing trial court because it erroneously consolidated cases involving distinct fact, prejudicing defendant)³. Consolidating these cases, therefore, would confuse the issues, confuse the Commission, and prejudice Aiken.

CONCLUSION

The Commission denied Aiken due process of law by granting SCE&G's motion to consolidate before Aiken's time to respond had expired. This substantially prejudiced Aiken because cases 2005-180-E and 2003-254-E are legally, factually, and geographically distinct. The Commission, therefore, should vacate its orders dated June 30 and July 7 and allow Aiken an opportunity to be heard.



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August 19, 2005.

³ Federal Rule 42 is substantially identical to the South Carolina Rule and, therefore, it is appropriate to look to decisions construing that rule. Dawkins v. Fields, 354 S.C. 58, 67, 580 S.E.2d 433, 437-38 (2003); George v. Fabri, 345 S.C. 440, 452-53, 548 S.E.2d 868, 874-75 (2001); Dalon v. Golden Lanes, Inc., 320 S.C. 534, 541, 466 S.E.2d 368, 372 (Ct. App. 1996).

IN RE:

CERTIFICATE OF SERVICE

N. Pruet Adams Kleemeier
NEXSEN PRUET ADAMS KLEEMEIER, LLC

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